



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for August 25, 2023

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Appellant: Iris Cooper

Agency: Department of Veterans Affairs

Decision Number: [2023 MSPB 24](#)

Docket Number: DC-1221-15-1168-W-1

Issuance Date: August 24, 2023

Appeal Type: Individual Right of Action (IRA) Appeal

Whistleblower Protection Act

- Jurisdiction
- Personnel Actions

The appellant was formerly employed by the Department of Veterans Affairs (VA or agency) until January 2014, when she accepted a position with the Department of the Treasury. In September 2015, she filed an IRA appeal alleging that the agency took various personnel actions against her in reprisal for protected disclosures she made between 2009 and 2014. In particular, she alleged that from June 2012 to December 2014, her former supervisor caused the agency's Office of Inspector General (VA OIG) to investigate her, dissuaded the VA OIG from abandoning its investigation, caused the VA OIG to issue a report containing false conclusions about her conduct related to a particular Government contract, and threatened to send the report to the Department of the Treasury to ruin her career. The appellant further alleged that, following the issuance of the VA OIG report in December

2014, the Department of the Treasury conducted its own investigation regarding the allegations against her, during which time it temporarily withheld her 2014 raise and bonus. She further alleged that in February 2015, the VA retroactively downgraded her 2012 performance rating from Outstanding to Unsatisfactory, and that her former supervisor removed her responsibility for approving Federal Acquisition Certification for Contracting (FAC-C) certifications for interns.

Without holding the requested hearing, the administrative judge dismissed the appeal for lack of jurisdiction. He found that the appellant failed to allege that the removal of her ability to grant FAC-C certifications (a duty that arose once per year) constituted a significant change in duties, responsibilities, or working conditions. He further found that the VA OIG investigation, including its initiation, continuation, and ultimate report of investigation, did not amount to a personnel action under 5 U.S.C. § 2302(a)(2), and that the appellant did not identify any personnel action related to the OIG investigation. The administrative judge also found that the appellant failed to exhaust her remedies with the Office of Special Counsel (OSC) regarding the retroactive downgrade of her 2012 evaluation. Finally, he found that the appellant's allegation that the agency threatened to remove her from her position at the Department of the Treasury failed to constitute a nonfrivolous allegation that she was subjected to a personnel action because the VA lacked the authority to remove her from her position at another agency. The appellant petitioned for review.

Holding: The Board found that the appellant nonfrivolously alleged that her former supervisor at the VA threatened to take a personnel action against her when he attempted to have her removed from her position at the Department of the Treasury. The Board further found that the appellant nonfrivolously alleged that she made protected disclosures that were a contributing factor in the threatened removal.

1. The Board first found that the appellant exhausted her claims before OSC with the exception of the retroactive downgrade of her 2012 performance evaluation. The appellant asserted on review that, had OSC pursued an investigation, it would have discovered the downgrade, but the Board found that this amounted to a new allegation that was not presented to OSC.
2. The Board next considered whether the appellant was subjected to a threat of removal, in particular, whether her former supervisor at VA could have threatened to have her removed from

a different agency. The appellant alleged that her former supervisor: (1) filed an anonymous complaint with the VA OIG alleging that she improperly awarded a contract based on her personal association with an owner of the company; (2) caused the VA OIG to continue its investigation of her after she left the agency, notwithstanding the VA OIG's intent to abandon its investigation; (3) caused the VA OIG to issue a report in December 2014, that contained untrue statements about her; and (4) stated to a former coworker that he pressured the VA OIG to issue the report, that he was going to send a copy of the VA OIG report to the Department of the Treasury, that he wanted to ruin the appellant's career, and that he hoped she would end up in jail.

3. The Board found that the appellant nonfrivolously alleged that her former supervisor had the authority to recommend a personnel action against her. The Board noted that it has construed the exercise of supervisory authority under 5 U.S.C. § 2302(b) quite broadly to include instances where a manager's recommendation or threat that an employee be removed is given some weight and consideration, even if no action was ultimately taken against the employee. Moreover, an employee need not be employed by the agency alleged to have retaliated against her as long as she meets the definition of an employee.
4. Next, the Board considered whether the appellant nonfrivolously alleged that her former supervisor threatened to have her removed. Although the VA OIG report did not recommend any discipline because the appellant was no longer employed at the VA, the possibility of the appellant being disciplined based on the severity of the substantiated allegations against her as a high-ranking Government official would not be insignificant. Additionally, the appellant alleged that her former supervisor made the complaint to the VA OIG that caused the OIG to investigate her, that he routinely threatened other employees that he would have the VA OIG investigate them, and that, due to his control over a supply fund which partially funded the salaries of VA OIG employees, he exerted control and/or influence over the VA OIG. Finally, the appellant alleged that her former supervisor admitted to another employee that he had convinced the VA OIG to issue the December 2014 report, notwithstanding the VA OIG's stated intent to abandon its investigation after the appellant left the VA, and that he was going to send the report to the Department of the Treasury because he wanted to ruin the appellant's career and see her go to jail. In addition, the Department of the Treasury found in its own investigation that

“witness testimony consistently indicated that the VA OIG was directed by a senior official at the VA to conduct the VA OIG investigation, and have it released months after [the appellant] left the VA, in an effort to ruin [her] career and reputation.”

5. The Board concluded that such allegations, taken together, amounted to a nonfrivolous allegation that the appellant’s former supervisor threatened to take a personnel action (i.e., removal) against her. The Board noted that it was interpreting the word “take” in § 2302(b)(8) broadly, considering that the section covers employees who also have the authority to recommend personnel actions, and also given the ordinary, contemporary, and common meaning of the word “take” (which includes “undertake” or “set in motion”). Furthermore, while the Board acknowledged that the Department of the Treasury’s report of investigation exonerated the appellant, the fact that it declined to carry out the threat to remove her was not dispositive.
6. Turning to the appellant’s disclosures, the Board found that the appellant nonfrivolously alleged that she disclosed violations of the Federal Acquisition Regulations as well other violations of law, rule, or regulation. The Board further found that the appellant nonfrivolously alleged that she disclosed abuse of authority by her former supervisor.
7. The Board further found that the appellant nonfrivolously alleged that at least some of her alleged disclosures were a contributing factor in the agency’s decision to threaten her removal. Her former supervisor had knowledge of several of her disclosures, and some of these were made within 2 years before his initiation of the VA OIG complaint against the appellant.
8. In sum, the Board found that the appellant nonfrivolously alleged that she made at least one protected disclosure that was a contributing factor in at least one personnel action. Accordingly, the Board remanded the case for adjudication on the merits.

COURT DECISIONS

NONPRECEDENTIAL:

Brooks v. Merit Systems Protection Board, No. [2023-1650](#) (Fed. Cir. Aug. 21, 2023) (MSPB No. DA-3443-17-0032-I-1)

Because Mr. Brooks had raised a discrimination claim before the Board and

continued to seek judicial review of that claim, the court agreed with the Board's request to transfer the case to the U.S. District Court of the Southern District of Texas, which was the appropriate forum under 5 U.S.C. § 7703(b)(2).

McMillin v. Department of Veterans Affairs, No. [2023-1744](#) (Fed. Cir. Aug. 21, 2023) (MSPB Docket No. DA-0752-22-0328-I-1)

Ms. McMillan appealed her removal to the Board, and the administrative judge entered a settlement agreement into the record and dismissed the appeal. After the initial decision became final, Ms. McMillan petitioned the Federal Circuit before review. Her pleadings indicated that she had raised a discrimination claim before the Board and wished to continue pursuing that claim, thus making her case a mixed case outside the court's jurisdiction. The agency requested dismissal. Pursuant to 28 U.S.C. § 1631, the court instead transferred the case to the U.S. District Court for the Eastern District of Texas, which it found to be the proper forum under 5 U.S.C. § 7703(b)(2).

Nwanna v. Merit Systems Protection Board, No. [2023-1858](#) (Fed. Cir. Aug. 22, 2023) (MSPB No. DA-0752-15-0035-I-1)

The court dismissed the petition for failure to prosecute in accordance with the rules, based on the petitioner's failure to pay the required docketing fee.

Kent v. Social Security Administration, No. [2023-1329](#) (Fed. Cir. Aug. 24, 2023) (MSPB No. DE-0752-17-0171-I-1)

The court dismissed the petition for failure to submit an opening brief.